

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	8:05CR149
)	
Plaintiff,)	
)	
v.)	MEMORANDUM AND ORDER
)	
AARON M. OLIVO,)	
)	
Defendant.)	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	8:06CR239
)	
Plaintiff,)	
)	
v.)	MEMORANDUM AND ORDER
)	
AARON M. OLIVO,)	
)	
Defendant.)	

This matter is before the court on the defendant's "Petition Pursuant to 'Title 28, United States Code, Section § 2255' To Vacate, Set Aside, or Modify Sentence and For Violation of 5th and 6th Constitutional Amended Rights" (Filing No. 91 in 8:05CR149 and Filing No. 24 in 8:06CR239); Motion to Proceed In Forma Pauperis (Filing No. 89 in 8:05CR149 and Filing No. 22 in 8:06CR239); Motion for Copies (Filing No. 85 in 8:05CR149 and Filing No. 20 in 8:06CR239); and Motion for Ninety (90) Day Extension of Time (Filing No. 86 in 8:05CR149 and Filing No. 21 in 8:05CR149).

The court being fully advised finds that the Motion for Leave to Proceed In Forma Pauperis should be granted.

The defendant's motion for copies under 28 U.S.C. § 2250 is granted. The Clerk of Court is directed to provide to the defendant (1) indictment as to the grand jury charges (2) plea agreement between petitioner and government (3) sentencing hearing transcripts as to the final disposition and (4) any written or oral recordings or stipulations made by the parties.

The defendant failed to file his § 2255 petition on the standard § 2255 motion form; nonetheless, his pleading indicates that the defendant intended to file a "Motion to Vacate, Set Aside, or Correct Sentence by a Federal Prisoner under 28 U.S.C. § 2255 (§ 2255)," and the court will construe the pleading as a § 2255 motion. However, the United States Supreme Court has warned the federal courts not to recharacterize a *pro se* motion as a first § 2255 motion without informing the *pro se* litigant of the consequences of the recharacterization and allowing the litigant the opportunity to contest the recharacterization of, or to withdraw or amend the motion. See *Castro v. United States*, 540 U.S. 375, 377 (2003):

[W]e hold that the court cannot so recharacterize a *pro se* litigant's motion as the litigant's first § 2255 motion *unless* the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's "second or successive" restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing. Where these things are not done, a recharacterized motion will not count as a § 2255 motion for purposes of applying § 2255's "second or successive" provision.

Therefore, based on this authority, the defendant is allowed to amend or withdraw his § 2255 motion. If the defendant wishes to withdraw his § 2255 motion, he shall inform the court by November 16, 2007. The defendant is advised that the current motion was filed within his one-year statute of limitations; however, if the defendant chooses to

withdraw this motion and re-file a § 2255 motion at a later time, it may or may not be within the statute of limitation.

The defendant's motion for a ninety (90) days extension to acquire the necessary documents from his counsel, this court, and the government is granted. If after that review, the defendant wishes to amend his § 2255 motion, he shall inform the court by January 16, 2008. The Clerk of Court is directed to provide the defendant the standard § 2255 motion form which the defendant may use to amend his § 2255 motion. If the defendant does not respond to this order, the court will move forward with deciding the § 2255 motion as it currently stands.

IT IS ORDERED:

1. That the defendant's Motions to Proceed In Forma Pauperis (Filing No. 89 in 8:05CR149 and Filing No. 22 in 8:06CR239) are granted.
2. By November 16, 2007, the defendant shall inform the court if he wishes to withdraw his § 2255 motion (Filing No. 91 in 8:05CR149 and Filing No. 24 in 8:06CR239).
3. The defendant's Motions for Ninety (90) Day Extension of Time (Filing No. 86 in 8:05CR149 and Filing No. 21 in 8:05CR149) are granted as follows: By January 16, 2008, the defendant will provide the court with any amendments that he wishes to make to his § 2255 motion.
4. The defendant's Motions for Copies (Filing No. 85 in 8:05CR149 and Filing No. 20 in 8:06CR239) are granted as follows: The Clerk is directed to send a copy of the following documents in 8:05CR149 and 8:06CR239 to the defendant at his last known address: (1) indictment as to the grand jury charges (2) plea agreement between petitioner

and government (3) sentencing hearing transcripts as to the final disposition and (4) any written or oral recordings or stipulations made by the parties.

5. The Clerk is directed to send a copy of this order and two § 2255 motion forms to the defendant at his last known address.

DATED this 22nd day of October, 2007.

BY THE COURT:

s/Joseph F. Bataillon
JOSEPH F. BATAILLON
Chief United States District Judge